Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-864

BIAGIO J. PERRELLO, PETITIONER

v.

THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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v.

THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION, Respondent

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PETITION FOR A WRIT OF CERTIORATI TO THE SUPREME COURT OF INDIANA

The petitioner Biagio J. Perrello respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Indiana which temporarily suspends him from the practice of law.

OPINION BELOW

The opinion of the Supreme Court of Indiana has not appeared in the official state reports. It appears unofficially at 380 N.E.2d 72 and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on September 13, 1978. On September 25th, petitioner filed a motion to review that judgment. He withdrew that motion on September 29th, and filed a motion for stay of enforcement pending the filing of this petition for a writ of certiorari. On November 3, 1978, the Indiana Supreme Court approved the withdrawal of petitioner's motion for review of its judgment, but denied his motion for a stay of enforcement. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether the procedures specified by Indiana Supreme Court Rule A.D. 23, infra,

violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Specifically, (1) whether the Supreme Court of Indiana can constitutionally shift the burden of proof to the petitioner in a disciplinary proceeding and require him to prove that he should not be temporarily suspended from the practice of law, and (2) Whether Indiana Supreme Court Rule A.D. 23, denies the petitioner Due Process of Law because it fails to provide standards defining the basis for a temporary suspension from the practice of law.

INDIANA SUPREME COURT RULE INVOLVED

Indiana Supreme Court Rule A.D. 23, Sec 14(g), provides in pertinent part:

> "...Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent..."

The remaining portions of Indiana Supreme Court Rule A.D. 23 which pertain to this case are attached hereto as Appendix B.

STATEMENT OF THE CASE

On June 12, 1978, the Indiana Supreme Court Disciplinary Commission filed its verified complaint against the petitioner. On that same date, the Commission also filed a Motion for Suspension Pending a Final Determination on the Complaint under Indiana Supreme Court Rule A.D. 23, Sec. 11(c). On July 17th, petitioner filed his answer to the complaint and motion, and raised the same two constitutional questions presented in this petition.

The Disciplinary Commission's Motion for Temporary Suspension was called for trial trial on August 11, 1978, and petitioner was specifically told that since he had the burden of proof he should present his case in chief first. Petitioner rested without presenting any evidence. The Commission introduced the Oath of Attorneys signed by the petitioner and a transcript of the November 1977 hearing that resulted in his reinstatement after a prior suspension. No other evidence was introduced.

On August 17th, the Hearing Officer issued his findings of fact, one of which was that the petitioner had "wholly failed to meet the burden of proof" under Indiana Supreme Court Rule A.D. 23, Sec. 14(g).

He also found that the facts alleged by the Disciplinary Commission in its verified complaint constituted violations of the Code of Professional Responsibility and supported the Motion for a Rule to Show Cause. He recommended suspension pending a final determination of the merits of the Commission's complaint by the Supreme Court. On September 13, 1978, the Supreme Court issued its order adopting the Hearing Office's findings of fact and suspended the petitioner from the practice of law. The temporary suspension is currently in effect.

REASONS FOR GRANTING THE WRIT

This Court has held that "an attorney's calling or profession is his property within the true sense and meaning of the constitution...", Ex Parte Wall, 107 U.S. 265, 268, 2 S.Ct. 569, 27 L.Ed. 552 (1882), and that disbarment, while designed to protect the public, is a punishment imposed upon the lawyer, In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). In several recent cases, the Court has held that the Due Process Clause of the Fourteenth Amendment governs the laws and procedures for

admission to the practice of law and the discipline of attorneys. See, generally, Konigsburg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), In re Ruffalo, supra, and cases cited therein.

One of the most important procedural factors in determining the outcome of a trial is the allocation of the burden of proof. Armstrong v. Manzo, 380 U.S. 545 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). There is absolutely no doubt that the state cannot place that burden on a criminal defendant, Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), or on a defendant in a juvenile delinquency proceeding, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Nor can it do so when a fundamental right such as free speech is at stake, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). The state cannot create presumptions that have the effect of shifting the burden of proof

to civil defendants, so that they must prove they were not negligent, Western & Atlantic Railroad Company v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), and it cannot condition a new trial on the defendant's ability to show that a judgment procured without notice to him would have been rendered on his behalf had he been notified, Armstrong v. Manzo, supra. The burden remains on the plaintiff in injunctive proceedings, Fox Valley Harvestore v. A.O. Smith Harvestore Products, 545 F.2d 1096 (7th Cir. 1976). In criminal contempts, which, like the instant case, involve the issuance of a "rule to show cause", the state has the burden of proof, regardless of the terminology. Michaelson v. U.S. ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162 (1924), North American Coal Corporation v. United Mine Workers, 512 F.2d 238, 244 (6th Cir. 1975). The rule to show cause is merely a form of notice to the defendant. The same rule applies in civil contempts. Gompers v. Bucks Stove and Range Company, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

The reasoning behind this prohibition on allocating the burden of proof to a defendant is clear, especially in penal proceedings such as this one. As this Court noted in Speiser v. Randall, supra:

> "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due Process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519, supra." 357 U.S. at 525, 526.

Shifting the burden of proof to a defendant completely reverses the presumption that he is innocent until the

state proves him guilty, and this the state cannot do. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), In re Winship, supra. As this Court noted in Taylor v. Kentucky, ___ U.S. ___, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978):

> "It is now generally recognized that the 'presumption of innocence' is an inaccurate, shorthand description of the right of the accused 'to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it.' J. Wigmore, supra. The principal inaccuracy is the fact that it is not technically a 'presumption' -- a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence..." 56 L.Ed.2d at 474, n. 12.

Where the standard of proof is a mere

preponderence of the evidence, as it is in the instant case, Indiana Supreme Court Rule A.D. 23, Sec. 14(f), the allocation becomes even more critical, Speiser v. Randall, In re Winship (concurring opinion of Mr. Justice Harlan), supra.

Petitioner has an "interest of transcending value", Speiser v. Randall, supra, analagous to that of a criminal defendant: his professional standing as a lawyer, his established clientele, his right to practice in his chosen profession, and his income, present and future, Ex Parte Wall, supra.

Petitioner's suspension from the practice of law pending a final determination on the merits is a prejudgment remedy similar to a preliminary injunction, a garnishment, or a writ of attachment. It goes beyond these extraordinary remedies, however, because the temporary relief is the same as the final relief: suspension from the practice of law. Indeed, if petitioner is ultimately found innocent of the charges, he will have suffered the same kind of penalty that he would suffer if he is found guilty, even though the duration of

the suspension may be different.

When injunctive relief is sought, the plaintiff bears the full burden of proving his entitlement to such an extraordinary remedy. He must show that he will be irreparably harmed if the injunction does not issue, that the threatened injury to him outweighs the harm the injunction will inflict on the defendant, and that he has a reasonable likelihood of success on the merits of his complaint. Some courts also require a showing that there is no adequate remedy at law and that the granting of the injunction will not disserve the public interest. Fox Valley Harvestore v. A.O. Smith Harvestore Products, supra. Prejudgment garnishments stand on the same footing. They are allowed because there is some danger that the property or money will be forever lost or damaged, and therefore beyond the plaintiff's reach at the conclusion of the lawsuit. Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). There must generally be a showing of at least probable

cause for the garnishment. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). They differ only in the sense that prejudgment garnishments and attachments may be granted without notice to the defendant, and thus are more like temporary restraining orders than preliminary injunctions, at least at the initial stages of the proceedings.

The purpose of prejudgment relief is to preserve the court's ability to render a judgment after a trial on the merits, Canal Authority v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974). Such relief has no relationship to punishment or reparation for past wrongs, United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952), and it is limited to preserving the subject matter of the lawsuit and to preventing any further erosion of the plaintiff's rights by maintaining the status quo. Furthermore, the defendant's rights must be protected; i.e., by requiring the plaintiff to post bond to cover damages if the defendant prevails on the merits, North Georgia Finishing, Inc. v. Di-Chem, Inc., supra.

The Indiana Supreme Court procedures for prejudgment suspensions have none of the safeguards required for preliminary injunctions and prejudgment garnishments and attachments. There are no requirements that the alleged misconduct be ongoing, that there be a likelihood of irreparable harm to the public, that the Disciplinary Commission has a probability of success on the merits, or that the harm to the petitioner will be less than the harm to the public if he is not suspended. None of these allegations were made or proven by the Disciplinary Commission in the instant case. Absent any of the safeguards that are essential in remedial prejudgment proceedings, the temporary suspension suit becomes a trial on the merits, and hence is punitive rather than remedial. The only real difference between the temporary suspension proceedings and the trial on the merits is the allocation of the burden of proof. Indiana Supreme Court Rule A.D. 23, Sec. 14(g), supra.

The second constitutional infirmity with the rule governing temporary suspensions is that it contains no

standards for determining which offenses would, "if proven, warrant suspension pending prosecution". Indiana Supreme Court Rule A.D. 23, Sec. 11(c), infra. The rule is completely silent on this matter, leaving the decision within the absolute discretion of the Disciplinary Commission, the hearing officer, and the Supreme Court. This licenses each of them to create their own standards in each case, Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937), and it encourages arbitrary and inconsistent results, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The rule likewise fails to give attorneys of ordinary intelligence any notice that their conduct might result in a prejudgment suspension, United States v. Harriss, 347 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), and Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), and forces them to guess at its meaning and differ as to its application, Connally v. General Construction Company, 269 U.S. 385, 391,

46 S.Ct. 126, 70 L.Ed. 322 (1926). Nor does the rule advise an attorney what he must prove to avoid being suspended. It says only that he has the burden of proving that he should not be suspended, Indiana Supreme Court Rule A.D. 23, Sec. 14(g), without telling him what standards his evidence will be judged against.

Petitioner was thus denied any advance notice of the kinds of misconduct that warrant prejudgment suspension, he was denied any of the traditional safeguards required for preliminary injunctions and prejudgment garnishments and attachments, he was presumed guilty and required to prove that he should not be suspended, and he was denied any standards to assist him in preparing his proofs.

For these reasons, petitioner respectfully submits that the rule of the Indiana Supreme Court under which he is currently suspended from the practice of law violates his right to Due Process of Law under the Fourteenth Amendment to the United States Constitution. That rule is heavily and unconstitutionally weighted against the petitioner and in favor of the state and cannot be allowed to stand.

CONCLUSIONS

Based upon the above showing that petitioner has been substantially deprived of his Constitutional rights, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana in this cause.

Respectfully submitted,

William E. Marsh, Esq.

Ralph Ogden, Esq.

M. Anne Wilcox, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of November, 1978, three copies of this Petition for Writ of Certiorari were hand delivered to Mr. Sheldon Breskow, Esq., the Executive Secretary of the Indiana Supreme Court Disciplinary Commission, at his office, Room 814, I.S.T.A. Building, Indianapolis, Indiana 46204. I further certify that all parties required to be served have been served.

William E. Marsh, Esq.

APPENDIX A
OPINION BELOW

SUPREME COURT OF INDIANA
(NO. 678 S 105)

IN THE MATTER OF BIAGIO J. PERRELLO

ORDER OF SUSPENSION PENDING
FINAL DETERMINATION

Comes now the Disciplinary Commission of the Supreme Court and files "Motion for Suspension Pending Prosecution," which Motion appears more fully in words and figures as follows, to wit:

(H.I.)

And comes now the appointed Hearing Officer and, pursuant to Admission and Discipline Rule 23, Sec. 14(g), submits his written recommendation for suspension pending the determination of this cause.

This Court, being duly advised in the premises, now finds that, pursuant to Admission and Discipline Rule 23, Sec. 14(g), the Hearing Officer conducted a hearing on the Motion for temporary suspension and found that the Respondent

failed in his burden of proof of establishing why he should not be suspended from the practice of law pending the determination. Accordingly, this Court now further finds that the recommendation of the Hearing Officer should be accepted and approved.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by this Court that the Respondent, Biagio J. Perrello, is hereby suspended from the practice of law in thie (sic) State pending final determination by this Court of the present cause.

DONE at Indianapolis, Indiana, this 13 day of September, 1978.

/s/ Richard M. Givan
Richard M. Givan
Chief Justice of Indiana

All Justices concur.

APPENDIX B

RELEVANT PORTIONS OF INDIANA

SUPREME COURT RULE A.D. 23

Indiana Supreme Court Rule A.D. 23, Sections 11(a), 11(b), and 11(c) provide:

"(a) The members of the Commission shall consider and make a determination of the report of the recommendations of the Executive Secretary ***

"(b) If after such consideration, the Commission determines there is reasonable cause to believe the respondent is guilty of misconduct which would warrant disciplinary action, it shall file with the Clerk a complaint ***

"(c) If after such consideration aforesaid, the Commission determines there is reasonable cause to believe respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall include a motion to that effect in the aforesaid report to this Court, and this Court shall so advise the hearing officer or officers."

Indiana Supreme Court Rule A.D. 23, Section 14(f) provides, in pertinent part:

"(f)...the hearing officers shall determine whether misconduct has been proven by a preponderence of the evidence..."

Indiana Supreme Court Rule A.D. 23, Section 14(g) provides, in pertinent part:

"(g) If there has been a determination of reasonable cause as set forth under 11(c), and if the complaint states facts constituting such reasonable cause, the hearing officer or officers may, upon motion of the disciplinary commission, issue a rule against the respondent to show cause why he should not be suspended pending final determination of the cause and fixing a time and place certain for hearing thereon, *** Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent. If the respondent, in the opinion of the hearing officer or officers shall fail to sustain such

burden of proof, the hearing officer or officers shall submit to this Court a written recommendation whether or not the respondent be suspended pending final determination of the cause."